

Bryan W. Shaw, Ph.D., P.E., *Chairman*  
Toby Baker, *Commissioner*  
Zak Covar, *Commissioner*  
Richard A. Hyde, P.E., *Executive Director*



## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

October 14, 2014

Public Comments Processing  
Attention: FWS-R8-ES-2013-0011  
U.S. Fish and Wildlife Service Headquarters MS-BPHC  
5275 Leesburg Pike  
Falls Church, VA 22041-3803

Re: Comments on August 15, 2014 Proposed Rule – Designation of Critical Habitat for the Western Distinct Population Segment of the Yellow-Billed Cuckoo

Dear Sirs or Madames:

The Texas Commission on Environmental Quality (TCEQ) appreciates the opportunity to comment on the proposed rule to designate critical habitat for the western distinct population segment of the Yellow-Billed Cuckoo under the Endangered Species Act of 1973. The TCEQ fully supports the comments submitted by Commissioner Patrick R. Gordon for the Rio Grande Compact Commission to the United States Fish and Wildlife Service (USFWS) dated September 17, 2014. The TCEQ has concerns that the proposed critical habitat designation does not recognize the 1906 Convention with Mexico and the 1938 Rio Grande Compact, about the inclusion of the conservation pool of Elephant Butte Reservoir within the revised critical habitat, and development of a species recovery plan.

TCEQ acknowledges that dynamic riverine processes are important but notes that only a portion of the water in the Rio Grande is available to the state. Accordingly, Texas does not have control of all the water that may be needed to maintain dynamic riverine processes.

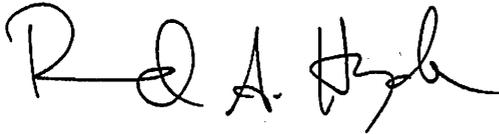
The TCEQ requests that the conservation pool of Elephant Butte Reservoir be excluded from the critical habitat designation for the western distinct population of the yellow-billed cuckoo. Any changes to the amount of available water storage in Elephant Butte Reservoir would have impacts on water deliveries to Mexico via the 1906 Convention with Mexico. Additionally, Elephant Butte Reservoir supplies water to New Mexico and Texas via the Rio Grande Compact. Changes in the amount of available water storage would impact the water supplies for the City of El Paso and thousands of acres of irrigated agriculture in Texas.

Prior to designating critical habitat, the USFWS should develop a species recovery plan for the cuckoo. Development of a species recovery plan should include a robust stakeholder process and the plan should be fully informed and structured to recognize the controls put in place on water through the 1906 Convention with Mexico and the 1938 Rio Grande Compact. Only then would it be appropriate for the USFWS to designate critical habitat.

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If you have questions concerning these comments, please contact Kimberly Wilson at (512) 239-4644, or by e-mail at [Kim.Wilson@tceq.texas.gov](mailto:Kim.Wilson@tceq.texas.gov).

Sincerely,

A handwritten signature in black ink, appearing to read "R. A. Hyde". The signature is fluid and cursive, with the first name "R" being the largest and most prominent letter.

Richard A. Hyde, P.E., Executive Director  
Texas Commission on Environmental Quality



## RIO GRANDE COMPACT COMMISSION

PATRICK R. GORDON  
TEXAS COMMISSIONER

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September 17, 2014

Public Comments Processing  
Attn: FWS-R8-ES-2013-0011  
U. S. Fish and Wildlife Service Headquarters MS:BPHC  
5275 Leesburg Pike  
Falls Church, VA 22041-3803

Re: Comments on August 15, 2014 Proposed Rule – Designation of Critical Habitat for the Western Distinct Population Segment of the Yellow-Billed Cuckoo

Please accept these comments on the designation of critical habitat for the western distinct population segment of the yellow-billed cuckoo (cuckoo). For Unit 52 (NM-8 Middle Rio Grande 1; New Mexico) the U. S. Fish and Wildlife Service (Service) has determined that it is appropriate to propose critical habitat into the conservation pool of Elephant Butte Reservoir down to river mile 54. Additionally, the Service is considering designating the area within the conservation pool of Elephant Butte Reservoir down to river mile 42.

I request that under Section 4(b)(2) of the Endangered Species Act (ESA) that the conservation pool of Elephant Butte Reservoir be excluded from the critical designation for the cuckoo. My concern is that such action could ultimately result in reduced storage in the reservoir. If the Service decides that the habitat within the conservation pool is critical to the survival of the cuckoo, I request it only be designated down to river mile 54 and not down to river mile 42. River mile 54 coincides with the designation of critical habitat for the southwestern willow flycatcher (flycatcher).

Section 4(b)(2) of the ESA provides provisions for the exclusion of the conservation pool area of Elephant Butte Reservoir from the final designation of the cuckoo critical habitat. The Section states in part *The Secretary may exclude any area from critical habitat if (s)he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless...the failure to designate such area as critical habitat will result in the extinction of the species concerned.* As the Texas Rio Grande Compact Commissioner, it is my belief that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat.

Elephant Butte Reservoir is a critical component to the 1906 Convention with Mexico and the 1938 Rio Grande Compact. Making any changes to the amount of available water storage in Elephant Butte Reservoir would have significant impacts on water deliveries to Mexico via the 1906 Convention with Mexico and water supplies to Colorado, New Mexico and Texas via the Rio Grande Compact. Elephant Butte Reservoir was authorized in 1905 as part of the Rio Grande Reclamation Project for the purpose of irrigation. The dam was completed in 1916. The Reservoir provides water for the irrigation of lands in the United States (both New Mexico and Texas) and Mexico, as well as

electric power in the areas of south-central New Mexico. The reservoir also provides water through contracts for municipal use; including as much as 50% of the City of El Paso's water supply.

The 1906 Convention with Mexico provided that after the completion of the proposed storage dam the United States would deliver to Mexico a maximum of 60,000 acre-feet of water annually in the bed of the Rio Grande at the point where the head works of the Acequia Madre now exist. This resolved longstanding water delivery issues with Mexico. Any reduction in storage at Elephant Butte Reservoir would result in lower water deliveries to Mexico and impacts to the 1906 Convention.

The Rio Grande Compact was an effort by the states of Colorado, New Mexico, and Texas to remove all causes of present and future controversy among the states. The Compact is both state and federal legislation. Elephant Butte Reservoir is a key component of the Compact whose storage levels have implications for all three states. The Compact defines *Project Storage* as the combined capacity of Elephant Butte Reservoir and all other reservoirs actually available for the storage of *Usable Water* below Elephant Butte Reservoir and above the first diversion to lands of the Rio Grande Project, but not more than a total of 2,638,860 acre feet. Thus, if the current storage space in Elephant Butte Reservoir is no longer fully available to store water, the delivery of water to the Rio Grande Project and Texas' rights under the Compact could be impaired. Consequently, the equities provided by the 1906 Convention and the Rio Grande Compact could be impacted.

New Mexico, under the Compact, has a delivery obligation to deliver water into Elephant Butte Reservoir, as well as the Rio Grande Project water users below the dam. Also, Articles VII and VIII of the Compact have provisions that are enacted whenever the storage of *Usable Water* reaches certain levels. The storage at Elephant Butte Reservoir is critical to how these provisions of the Compact are implemented.

Studies indicate that the cuckoo habitat areas within Elephant Butte Reservoir are dynamic systems, being created and destroyed over short periods of time. The habitat areas currently being used by the cuckoo are similar to habitat areas being used by the flycatcher. The Service recently designated the area down to river mile 54 as critical habitat for the flycatcher. The current habitat area in the conservation pool of Elephant Butte Reservoir was created due to recent drought conditions, which have exposed reservoir conservation storage areas and allowed riparian habitat to develop. This habitat has not always existed and only occurs when the reservoir recedes. The Bureau of Reclamation (Reclamation) has taken the position that any habitat below river mile 60 should be viewed as temporary habitat: given that the agency has no discretion to not store Rio Grande Project water when it flows into Elephant Butte. I support this position. Service representatives at the 2013 meeting of the Rio Grande Compact indicated that the area within the conservation pool of Elephant Butte Reservoir was designated for the flycatcher knowing "periodic inundation will occur and that we feel that that is probably beneficial to flycatcher habitat over the long run". The full storage of water in Elephant Butte Reservoir for water supply and/or flood control will occur at some point. In 2012, Reclamation developed and is implementing the *Southwestern Willow Flycatcher Management Plan for the Rio Grande Project*. It is my understanding that Reclamation intends to incorporate the cuckoo into this management plan in the near future. I support this effort.

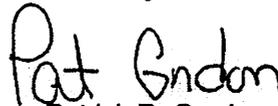
Data from Reclamation indicates that of the cuckoo territories in the area from river mile 42 to Highway 60 near Bernardo, New Mexico; approximately 75% are above river mile 54. It is also likely that there are additional territories above Highway 60. Significant areas of habitat for the cuckoo and existing territories are currently located in the Middle Rio Grande of New Mexico, particularly in the Escondida Reach. Thus, any exclusion of habitat within the Elephant Butte Reservoir pool will not jeopardize the existence of the cuckoo as a species. Furthermore, without a

Service Recovery Plan in place for the cuckoo, it is not possible to determine if the territory numbers to the north of river mile 42 or even river mile 54 would even be necessary to meet the recovery goal for this management area. I suggest that the Service first develop a recovery plan for the cuckoo. This would provide an accurate assessment of what is required to ensure survival of the cuckoo.

Elephant Butte Reservoir, ever since its completion in 1916, has been the focal point for agreements to resolve issues of water deliveries. Changing the parameters (potential effects of designating critical habitat on storage at Elephant Butte Reservoir) would result in changes to the equities of the 1906 Convention with Mexico and the Rio Grande Compact. It is hard to comprehend the impacts or the uncertainty of such changes on these long-term commitments.

Since the designation of the water storage area of Elephant Butte Reservoir as critical habitat could have adverse impacts on water deliveries under the 1906 Convention with Mexico and the Rio Grande Compact and significant amounts of habitat for the cuckoo are available for use in the surrounding area; I, as stated before, request the conservation pool of Elephant Butte Reservoir be excluded from the final designation of cuckoo habitat. If you have any questions, please give me a call at (915) 545-1133.

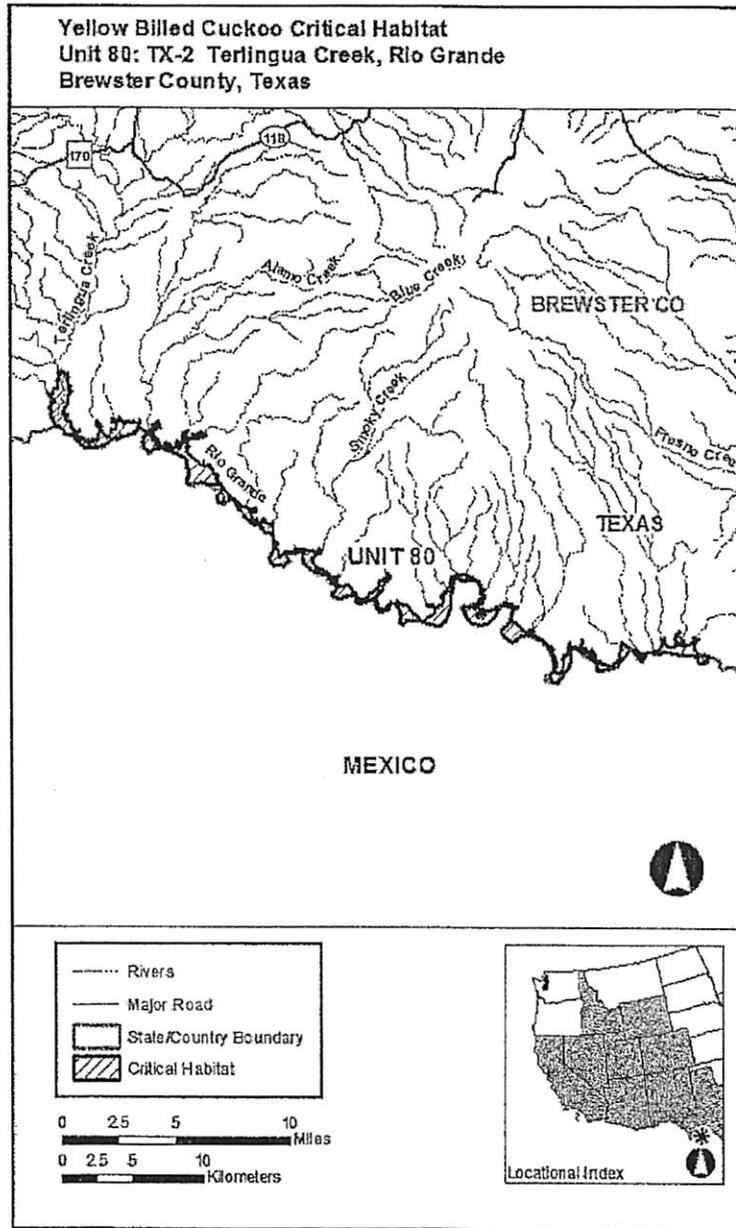
Sincerely,



Patrick R. Gordon,  
Rio Grande Compact Commissioner  
for Texas

PRG:hs

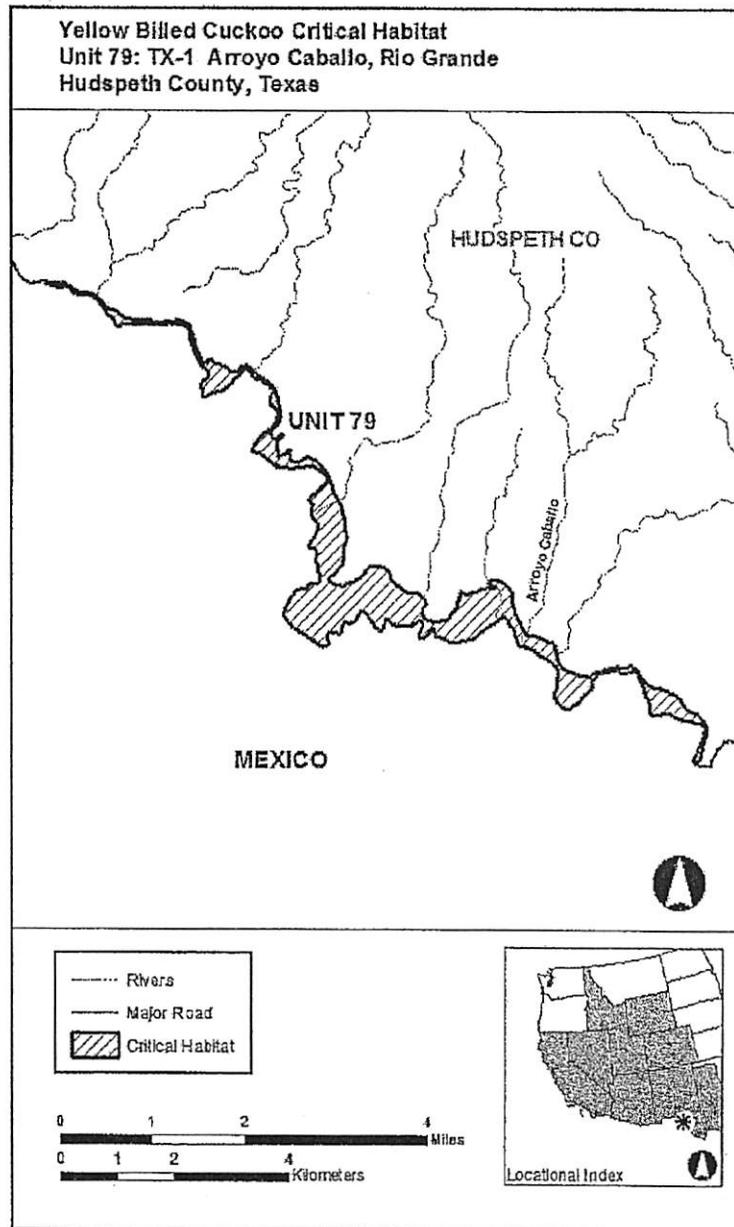
(88) Unit 80: TX-2, Terlingua Creek and Rio Grande; Presidio and Brewster Counties, Texas. Map of Unit 80 follows:



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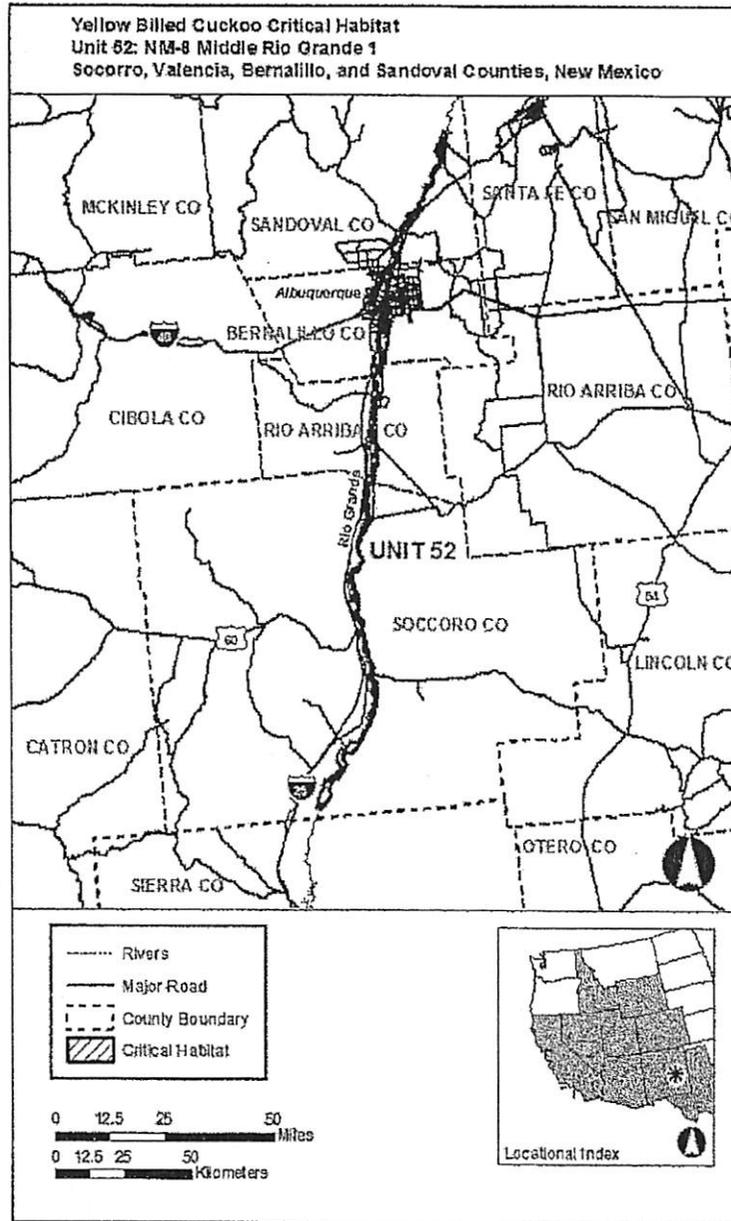
Dated: June 13, 2014.  
 Signed: Rachel Jacobson,  
*Principal Deputy Assistant Secretary for Fish  
 and Wildlife and Parks.*  
 [FR Doc. 2014-19178 Filed 8-14-14; 8:45 am]  
 BILLING CODE 4310-55-C

(87) Unit 79: TX-1, Arroyo Caballo,  
Rio Grande; Hudspeth County, Texas.  
Map of Unit 79 follows:



(60) Unit 52: NM-8, Middle Rio Grande 1; Sierra, Socorro, Valencia,

Bernalillo, and Sandoval Counties, New Mexico. Map of Unit 52 follows:



(7) Index map for New Mexico and Texas follows:

